1991

Thomas Farr v. Earl B. Brinkerhoff and Eunice Brinkerhoff : Brief of Appellee

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

THOMAS FARR,	:	
Plaintiff and Appellee,	:	Case No. 900444
vs.	:	
EARL B. BRINKERHOFF, and EUNICE BRINKERHOFF,	:	Priority No. 16
Defendants and Appellants.	:	91-0599-CA

BRIEF OF THE APPELLEE

APPEAL FROM AN ORDER OF THE SIXTH JUDICIAL DISTRICT COURT OF WAYNE COUNTY, THE HONORABLE DON V. TIBBS VACATING A SHERIFF'S SALE OF REAL PROPERTY

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JURISDICTION

The Court has jurisdiction to entertain this appeal pursuant to Section 78-2-2(3)(j), Utah Code Annotated, as amended. This matter may be transferred to the Court of Appeals pursuant to Section 78-2-2(4), Utah Code Annotated, as amended.

STATEMENT OF ISSUES

There are three issues presented for review.

1. Did the trial court have the power to grant appropriate relief to a party, if the party had not demanded such relief in its pleadings?

2. Is the failure to comply with Rule 69 of the Utah Rules of Civil Procedure grounds to set aside a sheriff's sale of real property?

3. Did any issue of material fact exist that would preclude the trial court from granting the judgment setting aside the sheriff's sale of the subject real property?

(Note: The first and the third issues presented are essentially the identical issues claimed by the Appellant's Brief. The second issue was not covered by the Appellant's Brief.)

The standard of review for the first issue was adequately stated by the Appellant and is restated for the court's convenience as follows:

> If the relief granted was not requested in the pleadings, is the party in whose favor it is rendered nevertheless entitled to that relief. URCP 54(c)(1). Did the failure to request the relief in question prejudice the opposing party in the preparation or trial of the case. Butler v. Wilkinson, 740 P.2d 1244

> (Utah 1987). However, the issue omitted in the pleadings must in fact be raised and the parties must be provided a full opportunity to meet it. Owen v. Owen, 734 P.2d 414 (Utah 1986). In order to grant relief outside the pleadings, facts developed by the evidence must warrant the relief granted and that relief must be a permissible form of relief for the claims litigated. Butler v. Wilkinson, 740 P.2d 1244 (Utah 1987). Most, if not all cases granting relief under Rule 54(c)(1), URCP, have done so in the context of relief being granted after trial where evidence has been received which bears upon the issues not framed by the pleadings. Combe v. Warren's Family Drive-Inns, Inc., 680 P.2d 733 (Utah 1984).

Brief of Appellants at page 1.

The second issue raises the question of whether or not an execution sale should be set aside, which question rests within the sound discretion of the trial court. The standard of review for this issue is then whether the trial court abused its discretion. State vs. District Court, 403 P.2d 634 (Mont. 1965), Johnson vs. Jefferson Standard Life Insurance Co., 429 P.2d 474 (Ariz. App. 1967), and generally 30 Am. Jur. 2d Executions Section 713.

The standard of review for the third issue is adequately stated by the Appellant and is restated for the court's convenience as follows:

> An appeal from a motion for summary judgment first determines the existence of a genuine issue of any material fact. Rule 56(c), URCP. Provo City Corp. v. State of Utah, 795 P.2d 1120 (Utah 1990). Facts and inferences drawn therefrom must be viewed in that light most favorable to the losing party. Provo City Corp., supra. In the absence of a genuine issue of a material fact, it must

> then be determined whether the moving party is entitled to judgment as a matter of law. Arrow Indus. v. Zion's First Nat'l Bank, 767 P.2d 935 (Utah 1988). In the absence of a material fact, the appellate court is free to reappraise the legal conclusions of the trial court. Whatcott v. Whatcott, 790 P.2d 578 (Utah App. 1990); Shire Development v. Frontier Investments, 799 P.2d 221, (Utah App. 1990).

Brief of Appellants at page 2.

DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, RULES AND REGULATIONS

The interpretation of portions of Rules 54 and 69 of the Utah Rules of Civil Procedure will be determinative of the outcome of this matter.

The pertinent portion of Rule 54 is as follows:

> (c) Demand for Judgment.
>
> (1) Generally. Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings. It may be given for or against one or more of several claimants; and it may, when the justice of the case requires it, determine the ultimate rights of the parties on each side as between or among themselves.

Rule 54(c)(1).

The pertinent portion of Rule 69 is as follows:

> (4) Purchaser refusing to pay. Every bid shall be deemed an irrevocable offer; and if the purchaser refuses to pay the amount bid by him for the property struck off to him at a sale under execution, the officer may again sell the property at any time to the highest bidder, and if any loss is occasioned

> thereby, the party refusing to pay, in addition to being liable on such bid, is guilty of a contempt of court and may be punished accordingly. When a purchaser refuses to pay, the officer may also, in his discretion, thereafter reject any other bid of such person.

Rule 69(e)(4).

STATEMENT OF THE CASE

On March 6, 1989, the Sheriff of Wayne County attempted to conduct an execution sale on certain real property located in Wayne County. The questions presented in this declaratory judgment action and now raised on appeal arise from that action.

Thomas Farr, the Plaintiff and Appellee (hereafter Farr) was attempting to execute against real property owned by Earl B. Brinkerhoff and/or Eunice Brinkerhoff (hereafter Brinkerhoffs). At the sheriff's sale only Farr, through his counsel, bid. Minutes before the sale Brinkerhoffs had a homestead declaration and a "correction" deed filed, both of which documents appeared to affect the real property being sold.

No money was ever sought by the Sheriff pursuant to Farr's bid. Some seven weeks after the purported sale, Brinkerhoffs' attorney demanded a sum of money from Farr's attorney.

In order to clarify the situation, Farr filed a declaratory judgment action raising three causes of action for determination:

1. When was the claimed homestead allowance money payable?

2. What was the effect of the "correction" deed, what interest did Farr really purchase at the sale, and was the earlier dismissal of Farr's action against Brinkerhoff for fraudulent conveyance obtained by fraud?

3. Whether the judgment debtors, the Brinkerhoffs, could claim any money was due to them or whether their only remedy was redemption?

Brinkerhoffs then counterclaimed seeking payment of the homestead allowance and the asserted over bid amount.

Both parties then filed Motions for Summary Judgment. The trial court reviewed the motions and issued an Order on August 21, 1989, wherein it found an issue of fact regarding Eunice Brinkerhoff's claim of ownership in the real property and found only an "issue", not an "issue in fact", regarding whether the sale was consummated. The court went on to order the parties to appear and show cause why the Sheriff's sale should not be set aside and why Eunice Brinkerhoff's interest should not be determined prior to re-execution on Farr's judgment.

On July 11, 1990, the show cause proceeding was held. Neither side presented evidence. Farr conceded that Eunice Brinkerhoff should be an interest holder in the real property. Farr also agreed that the sheriff's sale should be set aside. Brinkerhoff maintained it should not be set aside. The trial court then granted Eunice Brinkerhoff an interest in the real property and set aside the sheriff's sale, dismissing the declaratory judgment action.

The homestead allowance and interest of Eunice Brinkerhoff issues are not raised by this appeal.

STATEMENT OF FACTS

1. In 1980 the Brinkerhoffs purchased the real property at issue in this cause. They took title as joint tenants by warranty deed (R.63).

2. A judgment against Mr. Brinkerhoff was rendered in Alaska on September 20, 1985 for $65,520.20 in favor of Farr (R.13, 14, 66, 155).

3. Shortly thereafter the Brinkerhoffs created EBB, Inc., a Utah corporation, and conveyed the subject real property to that corporation by deed dated December 23, 1985, (R.65, 155). The consideration flowing to Brinkerhoffs for the conveyance of the land to EBB, Inc., was the ownership of the new corporation, although actual stock certificates were not issued (R.60, 65, 66).

4. After domesticating his judgment in Utah, Farr filed suit against the Brinkerhoffs and EBB, Inc., seeking to avoid as a fraudulent conveyance the December 23, 1985, deed to the corporation (R.10, 11, 12, 155, 156).

5. Subsequently, Mr. Brinkerhoff personally met with Paul D. Lyman, counsel for Farr, on November 23, 1988, to discuss that fraudulent conveyance action (R.156). This meeting resulted in an agreement for the suit to be dismissed in return for a deed conveying the real property from EBB, Inc., to Mr. Brinkerhoff individually (R.156). Mr Lyman drafted the deed, and Mr. Brinkerhoff signed it as corporate agent for EBB, Inc. (R.17, 66, 156).

6. Farr's counsel advised Mr. Brinkerhoff during this meeting that the deed would completely divest Mrs. Brinkerhoff of her interest in the property (R.156). Mr. Brinkerhoff later denied that he intended to divest his wife or the corporation of their interests in the property, and that he had the right or power to do so, and suggested that Farr's counsel took advantage of him (R.66, 67).

7. Neither Farr, his counsel nor Mr. Brinkerhoff had contact regarding these matters with Mrs. Brinkerhoff at that time, and she later stated that she "did not agree to, approve of, or acquiesce in" a deed which divested the corporation of its title to the land, and never "waived any claim she had in" the land or the corporation (R.60).

8. Mr. Brinkerhoff claims the subject real porperty had a fair market value in 1980, before improvements, of $257,413.00 (R.65). In 1986, after improvements, it appraised for $350,500.00 (R.65). At the time of the Sheriff's sale, the property was encumbered by a mortgage to First Security Bank in the amount of $110,000.00 (R.67).

9. Farr executed against the property and a sheriff's sale occurred on March 6, 1989, (R.67, 157). Farr did not personally attend the sale, but was represented by his counsel who bid on his behalf (R.3, T.12). Farr was the only bidder. His bid amount was $121,416.05, but he did not pay the bid (R.67).

10. Immediately prior to the sale, Mr. Brinkerhoff recorded a homestead claim for $10,000.00, and a "correction" deed to the property which vested title in him and his wife jointly (R.67). Before making the bid, Farr's counsel reviewed both the homestead declaration and the correction deed, and discussed those instruments by telephone with counsel for Brinkerhoffs (T.12).

11. Mr. Brinkerhoff claims that Farr's Alaska judgment totalled $89,306.72 on the date of sale (R.68).

12. Following the sale, Farr's counsel prepared a Certificate of Sale and secured the signature thereto of the Deputy Wayne County Sheriff who conducted the sale (R.3, 26, 27), the latter having signed the Certificate on March 17, 1989 (R.27), eleven days after the sale.

13. By letter dated April 25, 1989, counsel for Brinkerhoffs requested that Farr pay his bid (R.3, 28, 29). Farr responded by filing the underlying declaratory judgment action against Brinkerhoffs dated May 4, 1989, seeking certain relief as to (a) the time when payment of the homestead allowance should be made, (b) the interest, if any, of Mrs. Brinkerhoff in the subject real property, and (c) whether redemption was available to Brinkerhoffs for an amount less than Farr's bid (R.1-6). Brinkerhoffs answered the Complaint, contending that relief thereunder was improper, and counterclaimed for (a) an adjudication that Mrs. Brinkerhoff owned one-half of the land,

and (b), in essence, for the court to confirm the sheriff's sale and grant a judgment against Farr (R.32-37).

14. In June, 1989, Farr moved for summary judgment (R.40, 41), without affidavits to support the motion, but a memorandum was filed claiming the same relief as his Complaint (R.42-54). Brinkerhoffs then moved for summary judgment (R.134-142), supporting their motion with affidavits and other documents (R.57-133).

15. On August 21, 1989, the District Court issued an Order, wherein the pending motions for summary judgment were denied because "an issue of fact" existed regarding Mrs. Brinkerhoff's ownership in the property and because "an issue" existed regarding whether the sale was consummated, when it was uncertain what was sold and when the bid price was not paid (R.145). The court went on to order the parties to appear and show cause why the sheriff's sale should not be set aside and why Mrs. Brinkerhoff's interest should not be determined prior to further execution on the judgment (R.145).

16. In response to the court's Order, Farr's counsel filed an Affidavit, entitled "Proferred Testimony of Paul D. Lyman," which fully explained the events that occurred in the November 23, 1988, meeting of the affiant and Mr. Brinkerhoff, which explanation contraverted what Mr. Brinkerhoff had earlier asserted regarding his wife's interest in the subject real property (R.155-157).

17. On July 11, 1990, the court directed show cause hearing occurred and neither side presented any additional evidence, but both counsel argued at length (R.151, 152).

18. At the hearing Farr's counsel conceded on the issue of Mrs. Brinkerhoff's interest in the real property (R.151, 152 and T.4). Neither party has appealed that issue and it is resolved (R. 151, 152).

19. At the hearing the court refused to consider any homestead issue and neither party has appealed that issue (T.27).

20. During the course of the July 11, 1990, hearing, Brinkerhoffs, though their attorney, acknowledged that the sheriff's sale was defective. This happened in a discussion between the court and counsel that went as follows:

> THE COURT: At the time it was sold, they were supposed to get the money right then, weren't they?
>
> MR. TAYLOR: Yes.
>
> THE COURT: And they didn't get it?
>
> MR. TAYLOR: They never got anything. No money was paid.
>
> THE COURT: All right. So the sale was defective in that regard.
>
> MR. TAYLOR: In that regard. . . .

(T.8, 9).

21. However, Brinkerhoffs, through their attorney, later argued that the admittedly defective sheriff's sale should not be set aside (T.19).

22. The court ultimately set aside the sheriff's sale and dismissed the declaratory judgment action (R.152, T. 25, 26).

SUMMARY OF ARGUMENT

POINT I

DID THE TRIAL COURT HAVE THE POWER TO GRANT APPROPRIATE RELIEF TO A PARTY, IF THE PARTY HAD NOT DEMANDED SUCH RELIEF IN ITS PLEADINGS?

Rule 54(c)(1) of the Utah Rules of Civil Procedure allows a court to grant relief to which a party is entitled, even though it is not demanded in its pleadings. Through case law interpretation of this rule, the Utah Supreme Court has said that the non-pleaded relief is only authorized on issues that were either raised or tried at the trial court level. Combe vs. Warren's Family Drive-Inns, Inc., 680 P.2d 733 (Utah 1984) and cases cited therein.

The issue of whether the subject sheriff's sale should be set aside was directly raised by the Brinkerhoffs' motion for summary judgment, which sought for confirmation of the sale. It was directly raised by the court's Order of August 21, 1989, wherein the court ordered the parties to appear and show cause why the sale should not be set aside. Thus, the relief granted to Farr in setting aside the sheriff's sale, although not raised by the initial pleadings, was clearly raised and it was within the court's power to grant the relief it did.

POINT II

IS THE FAILURE TO COMPLY WITH RULE 69 OF THE UTAH RULES OF CIVIL PROCEDURE GROUNDS TO SET ASIDE A SHERIFF'S SALE OF REAL PROPERTY?

Local district courts control the processes that arise after judgments are effected. Failure to comply with Rule 69 of the Utah Rules of Civil Procedure has been grounds to set aside a sheriff's sale of real property. Taubert v. Roberts, 747 P.2d 1046 (Utah 1987).

The trial court correctly reviewed whether the subject sheriff's sale complied with Rule 69 and, after allowing all parties to respond, concluded that the sheriff's sale was defective and should be set aside. This was a discretionary act and, absent an abuse of this discretion, should not be reversed.

POINT III

DID ANY ISSUE OF MATERIAL FACT EXIST THAT WOULD PRECLUDE THE TRIAL COURT FROM GRANTING THE JUDGMENT SETTING ASIDE THE SHERIFF'S SALE OF THE SUBJECT REAL PROPERTY?

For the trial court to make its ruling, there had to be no remaining material issues of fact. The court's determination turned on two material issues of fact. First, what interest did Mrs. Brinkerhoff have in the subject real property? This issue was resolved by Farr conceding Mrs. Brinkerhoff's interest. Second, was the bid price paid? The fact the bid was not paid

was acknowledged by Brinkerhoffs' attorney at the July 11, 1990, hearing.

There may be other factual issues, but they are not material to the court's decision to set aside the sheriff's sale. Consequently, they can be ignored. The court's order setting aside the sale for failure to comply with Rule 69 was not precluded by any material issues of fact.

DETAIL OF ARGUMENT

POINT I

DID THE TRIAL COURT HAVE THE POWER TO GRANT APPROPRIATE RELIEF TO A PARTY, IF THE PARTY HAD NOT DEMANDED SUCH RELIEF IN ITS PLEADINGS?

Rule 54(c)(1) of the Utah Rules of Civil Procedure controls this issue. It reads as follows:

> (c) Demand for judgment.
>
> (1) Generally. Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings. It may be given for or against one or more of several claimants; and it may, when the justice of the case requires it, determine the ultimate rights of the parties on each side as between or among themselves.

A leading case that interprets and applies this rule is Combe vs. Warren's Family Drive-Inns, Inc., 680 P.2d 733 (Utah 1984). In Combe the Supreme Court presented the general rule

that arises from Rule 54(c)(1), when the court began its analysis, as follows:

> It is a rule of long standing that every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings. Rule 54(c)(1), Utah R.Civ.P.; Behrens v. Raleigh Hills Hospital, Inc., Utah, 675 P.2d 1179 (1983), and cases there cited. However, findings which are at variance with the claims of both parties are not favored and are carefully scrutinized on review. West v. West, 16 Utah 2d 411, 403 P.2d 22 (1965). Although Rule 54(c)(1) permits relief on grounds not pleaded, that rule does not go so far as to authorize the granting of relief on issues neither raised nor tried. Cornia v. Cornia, Utah, 546 P.2d 890 (1976).

Combe, at 735. (Emphasis added.)

The Wayne County trial court in the case at hand did enter a final judgment granting relief that neither party had specifically demanded in its initial pleadings. Pursuant to Rule 54(c)(1) and the interpretation of Rule 54(c)(1) as presented in Combe, the propriety of such an action turns upon the question of whether the relief granted related to issues "raised" or "tried" by the pleadings. Combe, at 735. There was no trial so the only question is whether the relief granted was based upon issues "raised" in the proceedings.

Just as every coin has only two sides, an obverse side and a reverse side, every sheriff's sale has only two sides, a confirmed sale or a set aside sale. If either party seeks to have the subject sheriff's sale confirmed, then the issue of

whether the sale ought to be set aside is correspondingly raised.

Farr's declaratory action Complaint sought an interpretation of how the actions prior to, at, and after the purported sheriff's sale should be construed, which raised the issue of whether the sale should be set aside. Brinkerhoff's counterclaim raised the same sale set aside questions.

Brinkerhoffs' attorney acknowledged in the Brief of Appellants, the following:

> Brinkerhoffs also moved for summary judgment, asking that the Sheriff's sale be confirmed, in essence, and that Farr be compelled to pay his bid, or in the alternative, for judgment against Farr.

Brief of Appellants at page 11. (Emphasis added.)

Thus, Brinkerhoffs' own Brief acknowledges that the issues of "sale confirmation" and, by logical inference, its opposite, "sale set aside", were raised by the pleadings.

Furthermore, the trial court by its Order of August 21, 1989, ruling on the parties' motions for summary judgment, specifically stated as follows:

> There is an issue if the sale was consummated.

(R.145)

The court then went on to state as follows:

> Both parties are ordered to appear and show cause why the court should not set aside the Sheriff's sale. . .

(R.145)

The court then left it up to the parties to arrange a hearing on these issues.

On July 11, 1990, almost one year later, the anticipated hearing was held. Had Brinkerhoff chosen to present evidence on the set aside issue, which was clearly raised by the court in its Order of August 21, 1989, he could have done so. Instead, neither party presented evidence, both sides choosing to simply present additional argument on the issues that had been raised. The trial court then granted the relief it felt was appropriate, which conformed to the issues that had been raised.

Brinkerhoff is hard pressed to now somehow claim that the trial court stepped outside of its bounds of power and granted relief on issues that were not "raised". Rule 54(c)(1) as interpreted by the Utah Supreme Court in Combe and the other cited cases was properly followed and the action of the trial court should be affirmed. The issue of the sheriff's sale's validity was squarely raised and properly before the court. The relief granted to Farr, which had not been specifically raised by the initial pleadings, was appropriate and within the court's power to grant.

POINT II

IS THE FAILURE TO COMPLY WITH RULE 69 OF THE UTAH RULES OF CIVIL PROCEDURE GROUNDS TO SET ASIDE A SHERIFF'S SALE OF REAL PROPERTY?

A. Who Controls Enforcements of Post-Judgment Processes?

Before the issue raised in this section is addressed, a foundation issue needs to be addressed. That foundation issue is, "Who controls the enforcement of post-judgment processes?"

It is axiomatic that the local district court must have the power to control the processes that arise after judgments are effected. The general rule is as follows:

> There are numerous references in cases to the right of a court to grant relief from an execution by vacation thereof. This is true, not only of a writ of execution, . . ., but also of particular steps taken thereunder, such as the levy, sale, and deed. Such power of the court, arising from its complete control of its own process, is inherent. . .

30 Am. Jur. 2d Executions Section 711.

Rule 69 of the Utah Rules of Civil Procedure, acknowledges the control of the local district courts over the processes arising from their rulings as the following excerpts from Rule 69 demonstrate:

> Process to enforce a judgment shall be by a writ of execution unless the court otherwise directs, . . .

Rule 69(a) (Emphasis added.)

> The writ of execution must be issued in the name of the State of Utah, sealed with the seal of the court and subscribed by the clerk. . . .

Rule 69(b) (Emphasis added.)

B. Is The Failure To Comply With Rule 69 Grounds To Set Aside A Sheriff's Sale Of Real Property?

Rule 69(e)(4) of the Utah Rules of Civil Procedure controls this issue. It reads as follows:

> (4) Purchaser refusing to pay. Every bid shall be deemed an irrevocable offer; and if the purchaser refuses to pay the amount bid by him for the property struck off to him at a sale under execution, the officer may again sell the property at any time to the highest bidder, and if any loss is occasioned thereby, the party refusing to pay, in addition to being liable on such bid, is guilty of a contempt of court and may be punished accordingly. When a purchaser refuses to pay, the officer may also, in his discretion, thereafter reject any other bid of such person.

There appears to be no Utah case law that directly interprets Subsection (e)(4) of Rule 69. However, Subsection (e)(1) has been the subject of the Utah Supreme Court's interpretation in the case of Taubert vs. Roberts, 747 P.2d 1046 (Utah 1987).

In Taubert, the Utah Supreme Court reversed a ruling by the trial court, which lower court ruling had upheld the validity of a sheriff's sale of real property. The Supreme Court held that the steps specified by Rule 69(e)(1) were necessary to levy on real property and that the required steps had not begun within the time allowed by the rule. Consequently, the Taubert sale was set aside. Taubert, at 1050.

Applying the Subsection (e)(1) standard to Subsection (e)(4), if the trial court concluded that the sheriff's sale of the Brinkerhoff property was not consummated or was faulty in

that it failed to comply with the necessary steps under Subsection (e)(4), then the trial court can set aside the sale.

The trial court does this as a part of its power to control the processes that arise relating to real property within its district. (Note: The process in the case at hand arose from a foreign judgment, which no one disputes was properly filed and docketed in Wayne County. It is entitled to full faith and credit in Utah.)

Brinkerhoff argues that Occidental/Nebraska Federal Savings v. Mehr, 791 P.2d 217 (Utah App. 1990), controls the situation presented in this appeal. (Note: Occidental is also the case that Brinkerhoff presented to the court for its review at the July 11, 1990, hearing.) The Occidental case can be distinguished from the present case because Occidental involved a "trustee sale" and the present case involved a "judicial execution sale".

Although there are some similarities between a trustee sale and a judicial execution sale, the creditor can directly control a trustee sale, whereas the court, through the county sheriff, controls judicial execution sales. The Occidental case turned on asserted deficiencies that were under the control of the creditor, whereas in the present the debtor or the sheriff controlled the asserted deficiencies.

In the present case the trial court correctly asked if the sheriff's sale had been consummated, i.e., was Rule 69 complied with or not. When it was unclear what had been sold

(due to Brinkerhoff's last minute filing of a homestead declaration and a questionable "correction" deed) and it was clear that the bid price had not been paid, the trial court issued an Order requiring the parties to show cause why the sale should not be set aside. The trial court then allowed both parties to make additional presentations and arguments on the set aside issue. Finally, with its discretionary power, the trial court concluded Rule 69 had not been complied with and set aside the sheriff's sale of the subject real property.

The standard for review of a discretionary act is whether the trial court abused its discretion in so ruling. State vs. District Court, 403 P.2d 634 (Mont. 1965), Johnson vs. Jefferson Standard Life Insurance Co., 429 P.2d 474 (Ariz App. 1967) and 30 Am. Jur. 20 Executions Section 713. The trial court, in light of the Taubert decision regarding Subsection (e)(1) of Rule 69, acted cautiously and fairly and concluded that the sheriff's sale should be set aside. The sheriff's failure to follow Rule 69, constituted grounds for the trial court to exercise its discretion and set aside the sheriff's sale. This was appropriate and not an abuse of discretion. It should not be reversed.

POINT III

DID ANY ISSUE OF MATERIAL FACT EXIST THAT WOULD PRECLUDE THE TRIAL COURT FROM GRANTING THE JUDGMENT SETTING ASIDE THE SHERIFF'S SALE OF THE SUBJECT REAL PROPERTY?

Rule 56(c) of the Utah Rules of Civil Procedure states in pertinent part the following:

> . . .The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any show that there is no genuine issue as to any material fact . . . .

Almost an innumerable number of cases have confirmed this general rule. For the purpose of this appeal, the specific issue that needs to be more closely examined is, "does any material fact exist about which there is a genuine issue?" Heglar Ranch Inc. v. Stillman, 619 P.2d 1390 (Utah 1980). The Utah Supreme Court has stated:

> "The foregoing rule does not preclude summary judgment simply whenever some fact remains in dispute, but only when a material fact is genuinely controverted."

Heglar, at 1391.

The trial court made it very clear that its decision to set aside the sheriff's sale was because it did not believe the sale had been consummated. (See Order, August 21, 1989). The court questioned "what was sold?" It also questioned if a sale could happen "when (the) bid price was not paid?" Consequently, the trial court in making its ruling raised two factual issues that it felt were material. There may well be a number of other disputed facts, but the key question is, "was there a genuine controversy regarding the material facts?"

The first material fact question was, "what interest in the real property did Mrs. Brinkerhoff have?" It remained a

genuine issue until the July 11, 1990, hearing. At that hearing Farr conceded that she had an interest in the real property. Thereafter, there was no longer a material issue of fact regarding that issue.

The second material fact question was, "whether the bid price had been paid?" This fact was also not at issue as is shown by Brinkerhoffs' attorney's discussion with the court during the July 11, 1990, hearing:

> THE COURT: At the time it was sold, they were supposed to get the money right then, weren't they?
>
> MR. TAYLOR: Yes.
>
> THE COURT: And they didn't get it?
>
> MR. TAYLOR: They never got anything. No money was paid.
>
> THE COURT: All right. So the sale was defective in that regard.
>
> MR. TAYLOR: In that regard. . . .

Hearing on Order to Show Cause, Transcript of Proceedings, pages 8 and 9.

In the Brief of Appellants, under Point II, a series of asserted disputes surrounding non-material facts is raised, e.g., whether Farr's counsel was confused, what happened at an interview between Mr. Brinkerhoff and Farr's counsel many months prior to the sheriff's sale and whether the bid was reasonable. None of these asserted issues rises to the level of a material fact. If they are not material to the court's decision, then the court was not precluded from granting the judgment setting aside the sheriff's sale.

CONCLUSION

The District Court setting in Wayne County had the power to grant Farr the relief to which he was ultimately entitled. The issue of the validity of the sheriff's sale had been raised. Pursuant to the court's powers under the Utah Rules of Civil Procedure, and in light of the Utah Supreme Court's past handling of sheriff's sales, the court could use its discretion and set aside the subject sheriff's sale. There were no genuine issues of material fact and, consequently, the court was not precluded from issuing the judgment that it issued.

The District Court's action should be affirmed.

DATED this 8th day of March, 1991.

Paul D. Lyman

PAUL D. LYMAN
Attorney for Plaintiff

MAILING CERTIFICATE

I hereby certify that a full, true and correct copy of the above and foregoing BRIEF OF APPELLEE was placed in the United States mail at Richfield, Utah, with first-class postage thereon fully prepaid on the 8th day of March, 1991, addressed as follows:

Mr. Marcus Taylor
Attorney at Law
P. O. Box 728
Richfield, Utah 84701

Paul D. Lyman

ADDENDUM

TRIAL COURT ORDER, DATED AUGUST 21, 1989

FINAL ORDER OF DISMISSAL, DATED AUGUST 15, 1990

IN THE SIXTH JUDICIAL DISTRICT COURT IN AND FOR WAYNE COUNTY,

STATE OF UTAH

THOMAS FARR,

Plaintiff,

-vs-

EARL BRINKERHOFF
and EUNICE BRINKERHOFF,

Defendant.

O R D E R

CIVIL NO. 1218

The Motions for Summary Judgment of the Plaintiff and Defendants are both denied for the following reasons:

1. There is an issue of fact if Eunice Brinkerhoff has any ownership in that property allegedly sold.

2. There is an issue if the sale was consumated. If so, what was sold, and if the court should allow same when bid price was not paid.

Both parties are ordered to appear and show cause why the Court should not set aside the Sheriff's sale and why the interest of Eunice Brinkerhoff in the property should not be determined prior to execution on the foreign judgment.

The date of hearing shall be set at the convenience of Court and Counsel.

Dated this 21st day of August, 1989.

DON V. TIBBS
DISTRICT JUDGE

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Civil # 1218
Wayne County
Order August, 1989.

CERTIFICATE OF MAILING

On the 23 day of August, 1989, I mailed a copy of the above and foregoing Order to the following, postage pre-paid from offices at Manti, Utah:

Marcus Taylor, Attorney for Defendants
108 North Main, Richfield, Utah, 84701

Paul D. Lyman, Attorney for Plaintiff
Sevier County Courthouse, Richfield, Utah, 84701

Carole B. Mellor
District Court Administrator

Paul D. Lyman #4522
Attorney for Plaintiff
250 North Main Street
Richfield, Utah 84701
Telephone: 896-6812

IN THE SIXTH JUDICIAL DISTRICT COURT OF WAYNE COUNTY

STATE OF UTAH

THOMAS FARR,	:	
Plaintiff,	:	
vs.	:	ORDER OF DISMISSAL
EARL B. BRINKERHOFF and EUNICE BRINKERHOFF,	:	
Defendants.	:	Civil No. 1218

This matter came before the Court on July 11, 1990, at the District Courtroom, Loa, Utah, before the Honorable Don V. Tibbs. The Plaintiff was present through counsel, Paul D. Lyman, and the Defendants were present through counsel, Marcus Taylor. After both parties having previously submitted Motions for Summary Judgment, the parties were ordered to appear before the Court and show cause why the Court should not set aside the Sheriff's sale and why the interest of Eunice Brinkerhoff in the property should not be determined prior to execution on the foreign judgment. Both counsel were allowed to argue at length and stated that their respective positions were before the Court through oral argument, previous written argument and affidavits on file. The counsel for the Plaintiff offered to concede that Eunice Brinkerhoff was a joint tenant in the property, if the Sheriff's sale was set aside.

The Court, based upon the undisputed portions of the parties' affidavits in their respective motions for summary judgment, pointed out that on March 6, 1989, an execution sale of the Defendants' real property in Wayne

County was scheduled and conducted; that immediately prior to said sale, the Defendant, Earl B. Brinkerhoff, caused a "Warranty Deed (Correction)" along with a "Declaration of Homestead" to be filed with the Wayne County Recorder; that said correction deed purported to change the record ownership of said real property from just Earl B. Brinkerhoff to Earl B. Brinkerhoff and Eunice Brinkerhoff, as joint tenants; and that an amount was bid at the sale, which the Defendants claim was more than the debt, but no money was collected.

The March 6, 1989, sale was not consummated because it is not clear what was being purchased and the bid price was not paid, and in light of this Court's ruling and the Plaintiff's offer to concede on the issue of Eunice Brinkerhoff being a joint tenant with Earl B. Brinkerhoff, there are no more issues to be tried.

ORDER OF DISMISSAL

The Court then issued the following Order of Dismissal.

IT IS ORDERED, ADJUDGED and DECREED as follows:

1. The March 6, 1989, Sheriff's sale is set aside.

2. Eunice Brinkerhoff is a joint tenant with Earl B. Brinkerhoff in the following described real property in Wayne County, Utah:

> Commencing at the Northeast corner of the Southwest quarter of the Northwest quarter of Section 36, Township 28 South, Range 3 East, Salt Lake Meridian and running thence South 200 feet; thence West 200 feet; thence North 200 feet; thence East 200 feet to point of beginning.

3. This declaratory relief action is dismissed with prejudice.

DATED this _____ day of August, 1990.

APPROVED AS TO FORM:

MARCUS TAYLOR
Attorney for Defendant

DON V. TIBBS
DISTRICT COURT JUDGE